

1987

# Mark O. Haroldsen, Inc. dba Marko Enterprises, a Utah Corporation v. State Tax Commission, an agency of the State of Utah : Brief of Respondent

Utah Supreme Court

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David L. Wilkinson; Attorney General; Stephen G. Schwendiman; Assistant Attorney General; Michael F. Skolnick; Assistant Attorney General; Tax and Business Regulation Division. Steven D. Woodland; R. Stephen Marshall; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Plaintiff-Appellant Mark O. Haroldsen, Inc.

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UTAH SUPREME COURT

BRIEF

870468

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK O. HAROLDSEN, INC. d.b.a  
MARKO ENTERPRISES, a Utah  
Corporation,

Plaintiff-Appellant,

vs.

STATE TAX COMMISSION, an agency  
of the State of Utah,

Defendant-Respondent.

Case No. 870468

(Priority Classification  
14b)

BRIEF OF RESPONDENT  
STATE TAX COMMISSION

ON APPEAL FROM THE JUDGMENT OF THE TAX DIVISION  
OF THE THIRD JUDICIAL DISTRICT COURT FOR THE COUNTY OF  
SALT LAKE, STATE OF UTAH, HONORABLE TIMOTHY R. HANSON,  
DISTRICT JUDGE, PRESIDING

DAVID L. WILKINSON (3472)  
Attorney General  
STEPHEN G. SCHWENDIMAN (2891)  
Chief Assistant Attorney General  
MICHAEL F. SKOLNICK (4671)  
Assistant Attorney General  
Tax & Business Regulation Division  
130 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1019

STEVEN D. WOODLAND (3459)  
R. STEPHEN MARSHALL (2097)  
VAN COTT, BAGLEY, CORNWALL &  
McCARTHY  
50 South Main, Suite 1600  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333  
Attorneys for Plaintiff-  
Appellant Mark O. Haroldsen,  
Inc.

FILED

JUL 8 1988

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARKO ENTERPRISES, a Utah	)	
Corporation,	)	
	)	Case No. 870468
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	)	
vs.	)	
	)	
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130 State Capitol  
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Telephone: (801) 538-1019

STEVEN D. WOODLAND (3459)  
R. STEPHEN MARSHALL (2097)  
VAN COTT, BAGLEY, CORNWALL &  
McCARTHY  
50 South Main, Suite 1600  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333  
Attorneys for Plaintiff-  
Appellant Mark O. Haroldsen,  
Inc.

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
<u>POINT I</u> THE SUPREME COURT SHOULD REVIEW THE JUDGMENT OF THE DISTRICT COURT IN THIS TAX COMMISSION REVIEW PROCEEDING ON THE SAME BASIS AS OTHER JUDGMENTS .....	3
<u>POINT II</u> THE ACQUISITIONS OF THE MAILING LISTS WERE NOT THE USES OF SERVICES .....	4
<u>POINT III</u> THE USES OF THE MAILING LISTS ARE USES OF TANGIBLE PERSONAL PROPERTY TAXABLE UNDER UTAH USE TAX STATUTES .....	9
<u>POINT IV</u> THE LEGISLATURE COINED U.C.A. 59-16-3 IN GENERAL TERMS, IN ORDER TO AFFORD THE TAX COMMISSION GREAT LATITUDE IN ADMINISTERING THE STATUTE .....	19
CONCLUSION .....	19

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Accountants Computer Services, Inc. v. Kosydar</u> , 35 Ohio St. 2d 120, 298 N.E.2d 519 (1973) .....	5, 9
<u>Builders Components Supply Co. v. Cockayne</u> , 22 Utah 2d 172, 450 P.2d 97, 99 (1969) .....	19
<u>Chittenden Trust Co. v. King</u> , 143 Vt. 271, 465 A.2d 1100, 1102 (1983) .....	9, 14, 16
<u>Citizens Financial Corp. v. Kosydar</u> , 43 Ohio St. 2d, 331 N.E. 2d 435 (1975) .....	8
<u>Citizens &amp; Southern Systems, Inc. v. South Carolina Tax Commission</u> , 280 S.C. 138, 311 S.E.2d 717, 719 (1984) .....	13, 14
<u>Commerce Union Bank v. Tidwell</u> , 538 S.W.2d 405 (Tenn. 1976) .....	15
<u>Commissioner v. National Alfalfa Dehydrating &amp; Mining Co.</u> , 417 U.S. 134, 148 (1974) .....	16
<u>Community Telecasting Service v. Johnson</u> , 220 A.2d 500, 503 (Me. 1966) .....	7
<u>Comptroller of the Treasury v. Equitable Trust Co.</u> , 296 Md. 459, 464 A.2d 248, 250-54, 255, 261 (1983) .....	5, 9, 13, 16
<u>Dann v. Johnston</u> , 425 U.S. 219 (1976) .....	17
<u>Fingerhut Products Co. v. Commissioner of Revenue</u> , 258 N.W.2d 606 (Minn. 1977) .....	13, 18
<u>First National Bank of Fort Worth v. Bullock</u> , 584 S.W.2d 548 (Tex. Civ. App. 1979) .....	9
<u>Gottschalk v. Benson</u> , 409 U.S. 63 (1972) .....	17
<u>Hasbro Industries, Inc. v. Norberg</u> , 487 A.2d 124, 128 (R.I. 1985) .....	7, 9, 14

<u>Martin v. Reynolds Metals Co.</u> , 221 Or. 86, 342 P.2d 790 (1959) .....	11
<u>Michigan National Bank v. Department of Treasury</u> , 127 Mich. App. 646, ___, 339 N.W.2d 515, 517 (1983) .....	12
<u>Old West Realty, Inc. v. Idaho State Tax Commission</u> 110 Id. 546, 716 P.2d 1318 (1986) .....	6
<u>Parker v. Flook</u> , 437 U.S. 584 (1978) .....	17
<u>Parson Asphalt Products, Inc. v. State Tax Commission</u> , 617 P.2d 397 (Utah 1980) .....	3
<u>Pledger v. Cox</u> , 626 P.2d 45 (Utah 1981) .....	4
<u>Prince v. Empire Life Ins. Co.</u> , 19 Utah 2d 174, 428 P.2d 163 (1967) .....	4
<u>Sacramento Baseball Club, Inc. v. Great Northern Baseball Co.</u> , 748 P.2d 1058 (Utah 1987) .....	3, 4
<u>Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission</u> , 654 S.W.2d 873 (Mo. 1983) .....	11
<u>Skaggs-Walsh, Inc. v. State Tax Commission</u> , 120 A.D.2d 786, 501 N.Y.S.2d 520 (1986) .....	14
<u>Spencer Gifts, Inc. v. Director, Division of Taxation</u> , 182 N.J. Super. 179, 440 A.2d 104 (1981) .....	5, 11
<u>Texas Instruments, Inc. v. United States</u> , 551 F.2d 599 (5th Cir. 1977) .....	18
<u>Thorne and Wilson, Inc. v. Utah State Tax Commission</u> , 681 P.2d 1237 (Utah 1984) .....	11, 12
<u>Towne-Oller and Associates v. State Tax Commission</u> , 120 A.D.2d 873, 502 N.Y.S.2d 544 (1986) .....	8
 <u>STATUTES</u>	
<u>Utah Code Ann.</u> §59-16-3 .....	3, 4, 9, 10, 19
<u>Utah Code Ann.</u> §59-1-603 .....	4
 <u>OTHER AUTHORITIES</u>	
<u>Utah State Tax Commission Rule A12-02-S32(b)</u> .....	5
<u>Utah State Tax Commission Rule A12-02-S26</u> .....	10

Barron and Buldzok, <u>Fear of the Intangible: A Survey of the Accounting and Tax Issues Confronting the Software Industry</u> , 12 Rutgers Computer & Tech. L.J. 33, 79 (1986) .....	18
Cowdrey, 1980 B.Y.U. L. Rev. at 869 .....	16, 17
Comment, <u>Software Taxation: A Critical Reevaluation of the Notion of Intangibility, Software and Sales Tax: The Illusory Intangible</u> , 63 B.U.L. Rev.181 (1983) .....	8

## **STATEMENT OF FACTS**

1. Appellant is a Utah corporation which publishes and markets books and tapes and conducts seminars in the field of real estate. (Testimony of Richard B. Weeks, Formal Hearing Transcript at 8-9).

2. Appellant uses direct mail advertising as a marketing technique to contact potential customers and to invite them to seminars and conferences. (Weeks at 9.)

3. The appellant leases mailing lists containing names and addresses from various mailing list brokerage companies. The brokerage companies do not own the lists, but rather they have access to the raw lists of names through the owners' permission. (Weeks at 14.)

4. The brokerage companies compiled the lists of names and addresses to be leased to the appellant by narrowing the raw lists according to certain "selects" or characteristics such as geographic areas, gender, income bracket, home ownership, magazines purchased, and number of children. (Testimony of Thomas M. Tolman, Formal Hearing Transcript at 30.) The number and the type of the "selects" chosen varied according to the appellant's needs and desires. (Tolman at 29 and 31.) Most brokerage companies have access to the same raw lists (Tolman at 28.); and other companies, even those not involved in real estate, could lease the same lists with the same selects. (Tolman at 91.)

5. Appellant received the mailing lists in two forms. Approximately forty percent (40%) (Weeks at 14.) of the names and addresses were transferred via magnetic computer tapes from which the company prepared mailing lists on its own word processing equipment. (Weeks at 12.) The remaining sixty percent (60%) (Weeks at 14.) of the names and addresses appeared on typed lists which the appellant gummed and then cut up into labels



to be attached directly to the materials mailed. (Weeks at 12.) Each list, whether on tape or paper, was used only once according to the agreements between the brokerage companies and the appellant. (Weeks at 12 and 13.) Depending upon the instructions from the mailing list brokers, the appellant was required to either return or destroy each computer tape after the one use. (Weeks at 12.)

6. Each lease of the lists constituted a single transaction where the cost was determined by the value of the lists. (Tolman at 53.) There was no separate fee for the broker services (Tolman at 49, 84, 85.), although the lists' values could reflect the brokers' greater or lesser expenditure of time and effort. (Tolman at 29 and 62.)

7. The mailing lists on magnetic computer tapes were subjected to a merge-purge function by the appellant following their receipt from the broker companies. The merge-purge operated to combine the lists and to eliminate duplications in the names (Tolman at 102.)

8. Appellant claims that the rentals of the mailing lists were not subject to use tax because the lists are intangible and because the transactions involved payments for services. (Weeks at 19 and 20.)

9. For the audit period from July 1, 1979, through June 30, 1982, the Utah State Tax Commission assessed a use tax of \$19,711.21 plus penalties and interest. The appellant is requesting that approximately \$7,750.00 of the use tax deficiency be abated. All of the penalty has been abated and is not at issue before this court. The use tax was assessed on the rentals by the appellant of \$154,844.10 worth of mailing lists.

#### **SUMMARY OF ARGUMENTS**

1. The Supreme Court should review the district court's judgment in this tax commission review proceeding on the same basis as other judgments.

2. The acquisitions of the mailing lists were purchases of tangible personal property, not the uses of services.

3. The use of the mailing lists are uses of tangible personal property taxable under Utah use tax statutes.

4. The legislature couched U.C.A. 59-16-3 in broad, general terms in order to afford the tax commission great latitude in administering the statute.

## **ARGUMENT**

### POINT I

THE SUPREME COURT SHOULD REVIEW THE JUDGMENT  
OF THE DISTRICT COURT IN THIS TAX COMMISSION  
REVIEW PROCEEDING ON THE SAME BASIS AS OTHER  
JUDGMENTS

In Parson Asphalt Products, Inc. v. State Tax Commission, 617 P.2d 397 (Utah 1980) this court stated:

The review by this Court of the judgment of the district court in these tax commission review proceedings is on the same basis as other judgments: they are entitled to the presumptions of verity; the burden is upon appellant to show there was error; and this Court will not reverse unless the findings are without substantial support in the evidence, or there was error in law...

Appellant argues that since the parties stipulated that the formal hearing transcript and exhibits constituted a full record, this Court should consider the matter de novo. Appellant relies on Sacramento Baseball Club, Inc. v. Great Northern Baseball Co., 748 P.2d 1058 (Utah 1987) Sacramento Baseball holds, in pertinent part, that when a trial court relies on stipulated facts to decide the case, "this court does not apply the clearly erroneous standard, but will sustain the lower court's decision only if convinced of its correctness...Thus we examine the facts de novo." Id at 1060.

The ruling in Sacramento Baseball does not apply to the case at bar because the tax division of the district court was not functioning in the role of a trial court. Instead, it conducted a de novo review on the record of a tax commission decision pursuant to U.C.A. 59-1-603. U.C.A. 59-1-603 (repealed effective December 31, 1987) required the district court to conduct de novo review of "appeals from and petitions for review of decisions of the commission..." The type of review contemplated by the statute was a "trial upon the record made before the lower tribunal without the submission of new testimony. The purpose of the de novo requirement was to signify that the scope of the court's review of the record would include a fresh consideration of questions of fact as well as questions of law." Pledger v. Cox, 626 P.2d 45 (Utah 1981).

The district court conducted a complete trial de novo on the record, issuing findings of fact and conclusions of law. The stipulation of the parties merely certified the tax commission's record upon which the district court's review was based.

The Sacramento Baseball rule is further inapplicable because its rationale does not pertain. The rule is based on the premise that when a district court relies on stipulated facts, it lacks the opportunity to observe the witnesses and hear their testimony. See Prince v. W. Empire Life Ins. Co., 19 Utah 2d 174, 428 P.2d 163 (1967). In the case at bar, the trier of fact was the tax commission. The commissioners who heard the case had ample opportunity to see and hear the witnesses as well as to cross examine them.

## POINT II

### THE ACQUISITIONS OF THE MAILING LISTS WERE NOT THE USES OF SERVICES

To be taxable under §59-16-3 of the Utah Code Ann., the item used must be tangible personal property. Except for specific services outlined in §59-16-3(b), there is no tax on the use of services. The fact that the

mailing lists were leased for a one time use, rather than purchased, does not affect the question of whether there were uses of services or property. When a lessee has the right to possession, operation, or use of tangible personal property, then the use tax applies to the amount paid pursuant to the lease agreement, regardless of the duration of the agreement. Utah State Tax Commission Rule A12-02-S32(b). As the court said in Comptroller of the Treasury 296 Md. 459, 464 A.2d 248 (1983): "It is said each tape is used only once. But a dress pattern purchased at retail and used to make only one dress (or even if never used) is taxable." Id. at 261.

Both the computer tapes and the typed lists can be treated the same in the determination of whether the appellant was paying for services or for property when it rented the mailing lists. The use of both the computer tapes and the typed lists is either the use of property or the use of services. The issue here is one of property versus services rather than tangible property versus intangible property.

In determining whether a transaction is for property or for service, courts usually focus on the essence of the transaction or, in other words, the real and true object of the transaction. Spencer Gifts, Inc. v. Director, Division of Taxation, 182 N.J. Super. 179, 440 A.2d 104 (1981). The Supreme Court of Ohio, recognizing that most transactions involve a mixed degree of personal service and of transfer of tangible personal property, articulated the test as whether the real object sought by the buyer is the service per se or the property produced by the service. Accountants Computer Services, Inc. v. Kosydar, 35 Ohio St. 2d 120, 298 N.E.2d 519 (1973).

Once the dominant or primary purpose is decided, then the transaction is characterized as a single overall function, either the rental or purchase of equipment or the provision of services. Comptroller of the

Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983). Factors to be considered in determining the dominant purpose are as follows: (1.) whether the service involved was consequential or inconsequential to the conveyance of the tangible personal property; (2.) whether there was a separate charge for the service in addition to the charge for the products; (3.) whether the purchaser or renter acquired a tangible personal property interest; and (4.) whether the value of the product was temporary or transitory.

The appellant contends that the objects of its transactions with the mailing list companies were the services provided and that the rentals of the actual mailing lists were incidental and inconsequential to those services. The appellant claims that the service aspect far outweighs the value of the final products. However, such an argument is analogous to ordering a particular cake, relying on the baker's help and expertise in deciding what kind and how much, and then claiming that the baker's services were the object of the purchase, with the cake existing only as an incidental element.

Just as one makes a one time "use" of a cake by eating it, the appellant made a one time use of the mailing lists by using them. The services would have been meaningless without the mailing lists as the final products. What the appellant wanted and used were the names and addresses as they were delivered in tangible personal property form. The fact that the tapes and the paper cost little by themselves does not convert activities from the acquisitions of property into the acquisitions of services.

Recent court decisions deal with this issue in a realistic and practical manner. Old West Realty, Inc. v. Idaho State Tax Commission, 110 Id. 546, 716 P.2d 1318 (1986), involved a multiple listing service which

distributed monthly multiple listing booklets to salesmen who subscribed to the service. The Idaho Supreme Court found that the taxpayer failed to establish his entitlement to an exemption from the general sales taxing authority, although the transactions were admittedly mixed ones of services and property. The court rejected the plaintiff's argument that the objects of the sales were the services rendered. Instead, the court held that the transactions were taxable ones involving the transfers of the booklets which were defined as tangible personal property.

Even where services are the dominant element in a transaction, courts have found that the real object test may point to the final product as the essence of the transaction. In Hasbro Industries, Inc. v. Norberg, 487 A.2d 124 (R.I. 1985), a toy manufacturing company hired an art company to design and construct packaging for a new toy. The court found that, although there were considerable expertise and effort invested in producing the package and that the effort exceeded the component value of the resulting tangible personal property, the transfer of the personal property was not incidental to the service rendered. The Rhode Island Court, quoting Community Telecasting Service v. Johnson, 220 A.2d 500, 503 (Me. 1966), stated: "'The fact that property the subject of a sale is custom made and that labor is the principal cost factor does not establish the contract as one for rendition of services rather than sale.'" The court held that the real object of the transaction was the end product of the mechanical artwork from which to fabricate the toy package.

In this case, the appellant sought to gain access to the mailing lists. The focus and goal of the transactions were the uses of the names and addresses. While it appears to be true that the brokers offered advice and expertise based on past experience, the services provided were incidental to

the end products. (This is particularly true where the appellant in the instant case applied further services to the tapes after acquiring them; the merge-purge activities took place.) See Citizens Financial Corp. v. Kosydar, 43 Ohio St. 2d, 331 N.E.2d 435 (1975), where the court held that the object of the transaction was a hard-copy printout of the information.

There was no separate charge for the services in the instant case. Appellant did not pay for the services; it paid to obtain and to use the mailing lists.

When the appellant rented the lists from the list brokerage companies, it acquired a tangible property interest because Mark O. Haroldsen, Inc. could then use the lists and apply the information for its own purposes. See Cowdrey, Software and Sales Tax: The Illusory Intangible, 63 B.U.L. Rev. 181 (1983) (purchaser acquires a tangible personal property interest where primary purpose is to use a computer program from the user's own application).

It is irrelevant to the acquisition of a property interest that the rental entitled the appellant to only a one-time use of the names and addresses. The use tax is imposed regardless of how many times the property is used. The fact of one use does not change transactions for property into transactions for services. Towne-Oller and Associates v. State Tax Commission, 120 A.D.2d 873, 502 N.Y.S.2d 544 (1986). In Towne, the plaintiff rented computer time from Universal, a computer renting company, which, for a designated fee, allowed plaintiff's employees to go over to the company and to use their computers. The court held that plaintiff's use of computer time was taxable because it was a transfer of possession, even though Universal had the power to cease plaintiff's use at any time.

Courts sometimes distinguish between canned and custom software programs on the basis that custom-made programs essentially involve services

and may therefore be nontaxable. See First National Bank of Fort Worth v. Bullock, 584 S.W.2d 548 (Tex. Civ. App. 1979); Chittenden Trust Co. v. King, 143 Vt. 271, 465 A.2d 1100 (1983). However, this line of analysis appears arbitrary and weak when viewed in the light of recent court decisions which have taken a more practical view. See the earlier discussion and particularly Hasbro Industries, Inc. v. Norberg, 487 A.2d 124 (R.I. 1985). Whether the taxpayer purchases a program "off the shelf" or commissions a program to be custom-made, the real object of the transaction is the acquisition of the program.

Even if custom-made programs are considered nontaxable, the exemption for customization is inapplicable to the case at bar. The appellant did not purchase customized lists from the list brokerage companies. The brokers did not create the lists of names; they merely narrowed the lists down to specific areas chosen by the appellant such as geographic area, zip code area, or income level. Although the lists may have been altered or adapted to the appellant's specifications, they are not "customized" mailing lists. Comptroller v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248, 250-54 (1983). Customers frequently order products with certain specifications, such as a flavor of cake, a type of flower, or a color of clothing. However, these preferences do not render the products "custom-made." The brokers merely rearranged the forms of the raw lists of names. See Accountants Computer Services, Inc. v. Kosydar, 35 Ohio St. 2d 120, 298 N.E. 2d 519 (1973).

### POINT III

#### THE USES OF THE MAILING LISTS ARE USES OF TANGIBLE PERSONAL PROPERTY TAXABLE UNDER UTAH USE TAX STATUTES

Utah Code Ann. §59-16-3 (1983 Supp.) imposes an excise or use tax on "[t]he storage, use, or other consumption in this state of tangible



personal property." To be taxable under this section, there must be use of tangible personal property. By implication, there is no tax on intangible property. With the exception of specified services as outlined in Utah Code Ann. §59-16-3(b), there is no tax on the use of services. Therefore, if the property in a transaction is tangible personal property, then a tax is imposed. This is true unless the transaction was actually for a nontaxable service, and any transfer of tangible property was incidental to that service. The two elements are separate and independent requirements for taxation.

The fact that the mailing lists were rented or leased, rather than purchased, does not affect the question of whether there was a use of services or of tangible personal property. Under Utah Code Ann. §59-16-3(c) (1983 Supp.), tangible personal property leased or rented is specifically subject to use tax.

The Utah definition of tangible personal property is premised upon the traditional concept of tangible property, i.e., anything that can be possessed is an object of tangible property. Utah State Tax Commission Rule A12-02-S26 provides as follows:

Tangible personal property embraces all goods, wares, merchandise, produce, and commodities, all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged. It does not include real estate or any interest therein or improvements thereon nor does it include bank accounts, stocks, bonds, mortgages, notes and other evidence of debt, insurance certificates or policies, personal or governmental licenses. The term does not include water in pipes, conduits, ditches or reservoirs but does include water in bottles, tanks or other containers. Tangible personal property includes all other physically existing articles or things including property severed from real estate. A sales or use tax is imposed on the sale of tangible personal property.

In applying the limited traditional concept of tangible property, one must conclude that the mailing lists are tangible. They arrived at the

appellant's company in the form of magnetic computer tapes or typed sheets of paper, both of which are corporeal substances capable of being perceived by the senses and of being possessed and exchanged.

Today, courts realize that the "Doctrine of Tangibility" as traditionally stated is a somewhat irrelevant concept developed in an earlier time for different purposes. Spencer Gifts, Inc. v. Director, Division of Taxation, 182 N.J. Super. 179, \_\_\_, 440 A.2d 104, 120-21 (1981). Consequently, courts and legislatures have endeavored to expand the doctrine in order to maintain its viability and its applicability. See Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959) (where invasions of the owner plaintiff's land by invisible particles of toxic gas was held to be a physical trespass). The Utah definition does not specifically state that tangible property is only those objects that can be "perceived by the senses" and is, therefore, arguably broader and more modern than more limited definitions of other jurisdictions.

The Utah Supreme Court, recognizing the need to apply the legal concept of tangibility in a practical manner, held that the sale of foreign and rare coins was subject to state sales tax. Thorne and Wilson, Inc. v. Utah State Tax Commission, 681 P.2d 1237 (Utah 1984). The Utah court, quoting with approval the decision in Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission, 654 S.W.2d 873 (Mo. 1983) (en banc), stated "'it is important to look beyond legal fictions and academic jurisprudence in order to discover the economic realities of the case . . . .'" Thorne, 681 P.2d at 1238.

In Thorne, the court looked to the "essence of the transaction" and found that the coins were tangible personal property because they were "sold for their intrinsic value and their face value [was] not significant."

Id. at 1239. In the case at bar, the magnetic tapes were sold for their intrinsic value, the information contained in them; and the value of the tapes themselves was insignificant.

Valuable information on computer tapes is arguably less concrete than precious metal within coins; however, the coins had a further value to their buyers as a future investment, the worth of which would be determined by the worldwide market. "[W]here . . . they [the coins] are transferred as an investment commodity, they become tangible personal property . . . ." Thorne at 1239, quoting with approval the decision in Michigan National Bank v. Department of Treasury, 127 Mich. App. 646, \_\_\_, 339 N.W.2d 515, 517 (1983). Thus, the value of both the coins and the mailing lists lies in their abstract intrinsic qualities which vary in worth according to the market price applied. The essence of the transactions in Thorne was to acquire commodities. The essence of the transactions here is to acquire a property interest in the mailing lists so the lists could be utilized by the appellant.

Appellant contends that the mailing lists are nontaxable because they are the tangible embodiment of intangible information. Appellant argues that the tapes and cards are incidental to the transfer of information because the information can be transferred by alternative means. As support for its arguments, the appellant relies on cases dealing with or analyzing the qualities of computer software.

While it is true that the appellant desired to purchase the information on the tapes and typed sheets, the fact does not render the transactions nontaxable. To hold otherwise would require separating the intangible information from the tangible magnetic tapes and typed lists.

Inconsistent, unfair, and somewhat ridiculous consequences result from separating the value of the tangible medium from the value of the

information contained thereon or therein. For example, in Fingerhut Products Co. v. Commissioner of Revenue, 258 N.W.2d 606 (Minn. 1977), the court held that the mailing lists typed on sheets of paper were intangible and nontaxable while the mailing lists on gummed labels were tangible and taxable. Whether the names and addresses appeared on paper or on gummed labels, the names and addresses were what Fingerhut sought to acquire. Yet, the court drew a distinction between the two kinds of physical objects -- paper and gummed labels -- on the basis that the gummed labels were used directly on the envelopes while the names on the paper were not "used" in their present form.

Taxability should not depend on separability. Citizens & Southern Systems, Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E.2d 717 (1984). Magnetic tapes containing mailing lists are no different from books, records, or video tapes. Their value lies in the matter contained in them and generally not in the medium of transfer itself. Id., 311 S.E.2d at 718.

The court in Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983), stated that magnetic tapes are tangible personal property whose value is enhanced due to the programs encoded thereon; furthermore, a computer tape containing a copy of a program is no less intangible because the content is a reproduction of intellectual effort just as a book or record is no less intangible because it reproduces artistic effort. Magnetic tapes and books have intangible features, but they are primarily tangible in nature. (The Comptroller court said that "intangibility should not be determined by the extent of use. After all, a book that is read only once is and remains tangible personal property." Comptroller, 464 A.2d at 255. A book is tangible even if it is not ever read. The Comptroller court also noted that "because a taxable transaction might have been structured in a nontaxable form, it does not thereby become nontaxable." Id. at 261.)

In Hasbro Industries, Inc. v. Norberg, 487 A.2d 124 (R.I. 1985), the court recognized the inherent abstract nature of computer technology, but it refused to define computer software as an intangible object. The court stated that although a computer program consists of invisible, inaudible, electronic impulses, such impulses do not "simply float in space but are conveyed to the computer by way of the software program"; and in this way, the "software . . . is no different from other taxable personal property such as films, videotapes, books, cassettes, and records." Hasbro, 487 A.2d at 128. In each file, videotape, book, cassette, and record, the property's value lies in its respective abilities to store and later to display or transmit its contents. Chittenden Trust Co. v. King, 143 Vt. 271, 465 A.2d 1100 (1983). (The Vermont court steadfastly refuses to draw an intangible-tangible distinction when applying the definition of tangible personal property to computer software tapes and continually finds computer software is tangible personal property for sales tax purposes.)

The New York legislature, recognizing the futility of trying to separate the information from the medium to decide taxability, enacted a state statute which provides for the direct taxation of sales of information. In Skaggs-Walsh, Inc. v. State Tax Commission, 120 A.D.2d 786, 501 N.Y.S.2d 520 (1986), the court held that the sale of a customer list was taxable as a sale of information.

Even without a statute providing for the direct taxation of transfers of information, the court in Citizens & Southern Systems, Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E.2d 717 (1984), refused to accept the argument that computer programs can be separated from the magnetic tapes and, thus, should not be subject to taxation. The court stated that taxability should not depend on separability.

Unfortunately, Utah's legislature has not yet created or revised a statute which would update the concept of taxable tangible personal property in this state. As a result, this court must decide whether to interpret Utah's use tax law to encompass modern technology or whether to continue to be tied to an outdated and inappropriate test of tangibility as advocated by the taxpayer.

The most recent and the better reasoned decisions and law review articles adopt the more progressive approach. Statutes must be flexible and so must the hearing bodies interpreting and applying the statutes to ever changing fact patterns. Legislatures do not have the time or the resources to amend every law as its meaning and application come into question. Many courts have found magnetic computer tapes and the information that they carry to qualify as tangible personal property with unrevised statutes. This court should do the same.

Some earlier state court decisions reflect the struggle they experienced in deciding whether an object was tangible based upon whether the contents could have been transferred by an intangible medium. Some of these courts reasoned that since the information contained on the tapes could have arrived via telephone or cable transmissions, then the transactions using tapes were transfers of intangibles and were not taxable.

The problem with the "alternative intangible medium transfer" analysis is that it ignores realities and practicalities. Computer programs are not usually transmitted in alternative forms because of the inconvenience and because of the prohibitive costs, although such alternative forms are theoretically possible. Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976). The information is transferred on magnetic tapes because that is the most viable method. In comparison, the information in books could, in theory,

be transferred by the authors' reading the books over the telephone lines to the receivers. Taking the analogy further, actors could deliver "movies" by traveling and performing at different places. However, such modes of transmission are silly and unnecessary since printing presses and films are available. It is just as ridiculous to allege that since the mailing list companies could have read or sent the names and addresses to the taxpayer over the telephone (instead of using the magnetic tapes and typed sheets of paper to deliver the information), the mailing lists should be held to be intangible.

Furthermore, the decision of whether to tax a transaction depends on what occurred, and not on what might have occurred. Commissioner v. National Alfalfa Dehydrating & Mining Co., 417 U.S. 134, 148 (1974); Citizens & Southern Systems, Inc. v. South Carolina Tax Commission, 280 S.C. 138, 311 S.E.2d 717, 719 (1984). The taxability decision is made on the basis of the actual facts of the case. Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, \_\_\_, 464 A.2d 248, 261 (1983).

A taxpayer must accept the consequences of its choice of medium. Citizens & Southern Systems, Inc., 311 S.E.2d at 719; Chittenden Trust Co. v. King, 143 Vt. 271, \_\_\_, 465 A.2d 1100, 1102 (1983). There is no rationale for affording a taxpayer the benefit of a form of transaction it has not chosen. Cowdrey, Software and Sales Taxes: The Illusory Intangible, 63 B.U.L. Rev. 181 (1983). State laws that tax mediums such as books, films, and videotapes and yet refuse to tax computer tapes unfairly favor software manufacturers over the manufacturers of other products. Comment, Software Taxation: A Critical Reevaluation of the Notion of Intangibility, 1980 B.Y.U. L. Rev. 859.

Computer software must possess physical properties such as mass and volume to enable the host hardware unit to act in a predetermined manner,

much like a paper roll in a player piano. Id. Thus, software programs can be possessed, sold, created, or stolen.

Furthermore, the software industry has characterized itself as a manufacturer of tangible products. Id. at 868. Through amici curiae briefs in patent cases, software manufacturers have urged the United States Supreme Court to regard software as an apparatus or machine. Parker v. Flook, 437 U.S. 584 (1978); Dann v. Johnston, 425 U.S. 219 (1976); Gottschalk v. Benson, 409 U.S. 63 (1972). Trade publications also refer to software as a product, to its makers as manufacturers, and to its designers as engineers. 1980 B.Y.U. L. Rev. at 869, (quoting D. McGlynn, Distributed Processing and Data Communications at 258 (1978); M. Goetz, "The 'What is Software' Legal Snafu", at 3-4 (June 6, 1978) (unpublished paper presented at the National Computer Conference, Anaheim, California, by Martin A. Goetz, Senior Vice-President of Applied Data Research, Inc., Princeton, New Jersey)). Industry experts do not consider software to be intangible "information" residing within the hardware. They see software as a machine component, similar to electronic circuitry. 1980 B.Y.U. L. Rev. at 869, (quoting Goetz at 3; Myers, What is Software? Datamation, at 74 (Mar. 1979)).

An even stronger case can be made for treating the typed lists (as compared to the lists on magnetic computer tapes) as tangible personal property. Clearly, the typed mailing lists can be classified as "corporeal things capable of being possessed or exchanged." The typed labels are physical property used by the appellant by placing them directly on the circulars it mails. As mentioned earlier, the fact that the paper itself would be of little value without the names and addresses on it is irrelevant in determining the tangibility of the lists.



Moreover, in Fingerhut Products, the case relied on by the appellant, the Minnesota Supreme Court held that because the physical manifestations of the property (there the gummed labels) were used by separating and attaching the labels to the envelopes, they could be taxed as tangible personal property. Fingerhut Products, 258 N.W.2d at 610. Therefore, even if the computer tapes were found to be intangible, that decision would not be dispositive of the tangibility of the typed mailing lists.

All of the mailing lists the appellant rented from the Dependable List Company and others were used as tangible personal property. The value of the data is entirely dependent upon the existence of the physical medium containing the information. Texas Instruments, Inc. v. United States, 551 F.2d 599 (5th Cir. 1977). Both the magnetic tapes and the typed sheets of paper are tangible items. Both are used to transfer information from one place to another.

Endeavoring to separate the data from the medium or to distinguish an issue of tangibility between the tapes and the paper would result in faulty reasoning and inconsistent analysis. "Consequently, there has been a recent trend among state jurisdictions to characterize software, or its transference onto a tangible storage form (such as a tape or floppy disk), as tangible and therefore subject to sales and use taxes." Barron and Bildzok, Fear of the Intangible: A Survey of the Accounting and Tax Issues Confronting the Software Industry, 12 Rutgers Computer & Tech. L.J. 33, 79 (1986).

#### POINT IV

#### THE LEGISLATURE COUCHED U.C.A. 59-16-3 IN GENERAL TERMS, IN ORDER TO AFFORD THE TAX COMMISSION GREAT LATITUDE IN ADMINISTERING THE STATUTE

Appellant cites Builders Components Supply Co. v. Cockayne, 22 Utah 2d 172, 450 P.2d 97 (1969) for the proposition that "statutes imposing taxes and prescribing tax procedures should generally be construed favorably to the taxpayer and strictly against the taxing authority." Builders 450 P.2d at 99. However the same decision goes on to state in the next sentence: "Such rules, though salutary in proper circumstances, should not be so applied as to defeat or obstruct the correct operation and the application of taxing procedures. The payment of taxes is burdensome. But the means of relief is not to be found in allowing some taxpayers to slip by without paying their fair share and thus putting on even greater burden on others.: Id. at 99.

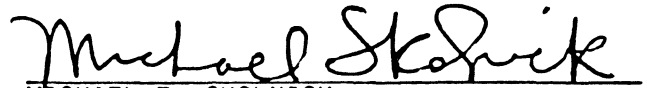
Appellant argues that U.C.A. 59-16-3 is ambiguous and should be construed in appellant's favor. This argument ignores the fundamental nature of the taxing statute at issue. U.C.A. 59-16-3 is a broadly worded piece of legislation. It clearly endows the tax commission with great discretion. Legislative reasoning behind the statute is quite simple. It implicitly recognizes the impossibility of enumerating all items embodied by the concept of tangible personal property.

#### CONCLUSION

The mailing lists at issue are tangible personal property. The lists and not the services of the brokers were the primary focus of the transactions. While services were involved, they were incidental to the acquisitions of the property interests in the tapes and labels. Thus, the

transactions for the rentals of the lists were taxable. Respondent respectfully asks this Court to affirm the district court's decision.

DATED this 8 day of July, 1988.

  
MICHAEL F. SKOLNICK  
Assistant Attorney General  
Tax & Business Regulation Division

CERTIFICATE OF MAILING

I hereby certify that on the 8 day of July, 1988, a true and correct copy of the Brief of Respondent was mailed first class, postage prepaid, to the following:

Steven D. Woodland  
R. Stephen Marshall  
VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
Attorneys for Appellant  
Mark O. Haroldsen, Inc.  
50 South Main Street  
Suite 1600  
Salt Lake City, Utah 84145

